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GLEN R. HAGEN

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GLEN R. HAGEN, Plaintiff, v. NCR CORPORATION, Defendant.	Case No.: 07 CV 2205 DMS (CAB) **PLAINTIFF'S EX PARTE APPLICATION TO CONTINUE EXPERT DESIGNATION AND RELATED DATES** **[FRCP 26(a)(2)(C)]** Date: Time: Judge: Hon. Cathy Ann Bencivengo Trial Date: May 9, 2009, 9:00 a.m.

Plaintiff, GLEN R. HAGEN, hereby applies for an Order to continue the date currently set for the first designation of experts, from June 17, 2008, to not earlier than August 18, 2008. Plaintiff also respectfully requests new dates be set respecting the follow up expert reports, now set for September 12, 2008.

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INTRODUCTION

The undersigned, on June 20, 2008, began seeking a stipulation with Miles Scully, Esq., lead defense counsel, to effect an extension of dates to designate experts. Mr. Scully has recently indicated Defendant has “no interest in changing the dates”. Thus this *ex parte* application.

NO PRIOR REQUESTS FOR CONTINUANCE OR EXTENSION

There has been no prior request for a continuance or extension of any date set forth in the Case Management Conference Order dated March 19, 2008.

REASONS

Plaintiff could not meet the June 17th deadline for two main reasons. (Please *see* attached AFFIDAVIT OF THOMAS R. GILL, ESQ., IN SUPPORT OF PLAINTIFF’S EX PARTE APPLICATION TO CONTINUE EXPERT DESIGNATION AND RELATED DATES, which is here incorporated by reference as though set forth in full.)

The parties’ counsel have discussed and agreed a central issue in this matter is whether or not Plaintiff was able, based upon his medical condition, to perform the essential functions of his position at the time of his termination, March 10, 2006. The determination of this question necessarily involves a forensic medical expert capable of making such an assessment.

No prejudice has been indicated nor does the undersigned foresee any prejudice that could accrue to Defendant should the expert designation date be extended.

Exclusion of expert testimony as a sanction for a violation of a discovery order rests in the Court’s sound discretion. The Court is required to consider: (1) the *explanation*, if any, for the party’s failure to comply with the discovery order; (2) the *prejudice* to the opposing party of allowing the witnesses to testify; (3) the *possibility of curing such prejudice by granting a continuance*; and (4) the importance of the witness’ testimony. (emphasis original) [*Barret v. Atlantic Richfield Co.* (5th Cir. 1996) 95 F3d 375, 380] *See* Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL, at 11:453 (The Rutter Group 2006).

This application is based on the AFFIDAVIT OF THOMAS R. GILL, ESQ., filed concurrently herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing, if any, on the application.

Respectfully submitted,

THE GILL GROUP, A.P.C.

Dated: July 1, 2008 By: s/ Thomas R. Gill, Esq.

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